

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF NEW YORK

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ROGER DAVIS,

Plaintiff,

- against -

TOWN OF HEMPSTEAD, et al.,

Defendants.

FILED
IN CLERK'S OFFICE
U.S. DISTRICT COURT E.D.N.Y.

★ APR 15 2013 ★

LONG ISLAND OFFICE

ORDER
09-CV-1128 (JFB) (ARL)

JOSEPH F. BIANCO, District Judge:

On March 18, 2009, *pro se* plaintiff Roger Davis commenced this action against defendants the County of Nassau, the Town of Hempstead Department of Buildings, Ray Schwarz, Richard Boden, Roy Gunther, and Joseph Lucchesi (collectively, "defendants"). Plaintiff submitted an amended complaint on May 19, 2009, a second amended complaint on June 2, 2009, and a third amended complaint on November 14, 2011. Over the course of this litigation, plaintiff has withdrawn his claims against the County of Nassau and Joseph Lucchesi.

On December 21, 2011, The Town of Hempstead filed a motion to dismiss the complaint. Plaintiff opposed the motion on February 15, 2012, and the Town of Hempstead replied on March 16, 2012. By Order dated November 20, 2012, the Court referred the motion to Magistrate Judge Lindsay for a Report and Recommendation.

On February 6, 2013, Magistrate Judge Lindsay issued a Report and Recommendation (the "R&R"), recommending that defendants' motion to dismiss be granted, but that plaintiff be given leave to amend the complaint if he can correct the defects that Magistrate Judge Lindsay identified

in plaintiff's pleading. The R&R further instructed that any objections to the R&R be submitted within fourteen (14) days of service of the R&R. (See Report and Recommendation dated February 6, 2013, at 12.) As indicated by the docket sheet, a copy of the R&R was mailed to plaintiff by Magistrate Judge Lindsay's Chambers on February 6, 2013. (See ECF No. 115.) On February 27, 2013, the R&R that was mailed to plaintiff was returned as undeliverable. (See ECF No. 116.) On March 4, 2013, the *pro se* department mailed plaintiff another copy of the R&R at a new address, which has not been returned as undeliverable. No objections have been filed to date, although the date for filing any objections has expired.

A district judge may accept, reject, or modify, in whole or in part, the findings and recommendations of the Magistrate Judge. *See DeLuca v. Lord*, 858 F. Supp. 1330, 1345 (S.D.N.Y. 1994); *Walker v. Hood*, 679 F. Supp. 372, 374 (S.D.N.Y. 1988). As to those portions of a report to which no "specific written objections" are made, the Court may accept the findings contained therein, as long as the factual and legal bases supporting the findings are not clearly erroneous. *See Fed. R. Civ. P. 72(b); Thomas v. Arn*, 474 U.S. 140, 149 (1985); *Greene v. WCI Holdings Corp.*, 956 F. Supp. 509, 513 (S.D.N.Y. 1997).

Having conducted a review of the full record and the applicable law, and having reviewed the R&R for clear error, the Court adopts the findings and recommendations contained in the well-reasoned and thorough R&R in their entirety. Even under a *de novo* standard, the Court adopts the R&R in its entirety. Accordingly, IT IS HEREBY ORDERED that defendants' motion to dismiss the complaint is granted.

"Leave to file an amended complaint 'shall be freely given when justice so requires,' Fed.R.Civ.P. 15(a), and should not be denied unless there is evidence of undue delay, bad faith, undue prejudice to the non-movant, or futility." *Milanese v. Rust-Oleum Corp.*, 244 F.3d 104, 110

(2d Cir. 2001). Plaintiff has already submitted three amended complaints in this case and it appears that any attempt to re-plead again would be futile, if requested. However, in an abundance of caution, the Court will allow plaintiff an opportunity to request leave to re-plead. If plaintiff wants to attempt to re-plead, plaintiff shall make such an application to the Court by May 13, 2013, explaining what additional allegations plaintiff would add to cure the defects identified in Magistrate Judge Lindsay's R&R. Failure to submit such a request by May 13, 2013 will result in dismissal of this case with prejudice.

SO ORDERED.

JOSEPH F. BIANCO
UNITED STATES DISTRICT JUDGE

Dated: April 15, 2013
Central Islip, New York